

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

DARREN HARRIS, 1:05-cv-00003-OWW-WMW (PC)

Plaintiff,

V.

ORDER DISMISSING SECOND AMENDED  
COMPLAINT WITH LEAVE TO AMEND

KIM, et. al.,

(Doc. 45)

## Defendants.

## I. SCREENING ORDER

Darren Harris ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis.

Plaintiff filed his original Complaint on January 1, 2005. (Doc. 1.) After being granted leave to file two amended complaints and various extensions thereon, Plaintiff filed his Second Amended Complaint on June 30, 2008. (Doc. 45.)

## **A. Screening Requirement**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been

1 paid, the court shall dismiss the case at any time if the court determines that . . . the action or  
2 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §  
3 1915(e)(2)(B)(ii).

4 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited  
5 exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534  
6 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a  
7 short and plain statement of the claim showing that the pleader is entitled to relief . . . .” Fed. R.  
8 Civ. P. 8(a). “Such a statement must simply give the defendant fair notice of what the plaintiff’s  
9 claim is and the grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. However, “the  
10 liberal pleading standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams,  
11 490 U.S. 319, 330 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not  
12 supply essential elements of the claim that were not initially pled.” Bruns v. Nat’l Credit Union  
13 Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268  
14 (9th Cir. 1982)).

15 **B. Summary of Plaintiff’s Complaint**

16 At the time of the issues complained of in his complaint, Plaintiff was a state prisoner at  
17 California Substance Abuse Treatment Facility and State Prison (SATF) in Corcoran, California.

18 Plaintiff names twenty-three defendants, and mentions nine other prison personnel  
19 throughout his factual allegations. Plaintiff’s complaint is voluminous, unorganized, repetitive,  
20 and not presented in chronological order. As best as the Court can tell, Plaintiff generally alleges  
21 that he was required to use a corrosive powerwash as part of his prison job duties, which burned  
22 his hands, feet, and eyes. Subsequently, he did not receive appropriate medical care, was forced  
23 to work jobs that were known to be likely to cause him injury, was denied access to the law  
24 library, was retaliated against, and had funds wrongfully take from his trust account. Plaintiff  
25 seeks relief by way of declaration, injunction, and monetary damages.

26 In the past, Plaintiff has stated some cognizable claims. However, the Second Amended  
27 Complaint is so verbose and unorganized that the Court is unable to see how any of the named  
28 defendants might be able to ascertain the precise basis for Plaintiff’s claims against him or her.

1 It should be noted that Plaintiff's complaint is organized with approximately ninety one pages of  
2 factual events followed by six delineated causes of action. Plaintiff incorporates all of the prior  
3 pages of factual events in each cause of action. Plaintiff does not specifically delineate which  
4 facts he feels show violations of which of his constitutional rights by any given defendant(s).  
5 Further, Plaintiff's factual allegations repeat variously throughout the Second Amended  
6 Complaint which complicates the screening of this case as subsequent repetitions are not always  
7 consistent with prior factual allegations. At this stage, the Court will not attempt to ascertain  
8 which of Plaintiff's factual allegations are accurate or disingenuous. It is Plaintiff's duty to  
9 correlate his claims for relief with their alleged factual basis. The Court will not guess as to  
10 which facts Plaintiff believes show any given constitutional violation(s). Thus, Plaintiff is being  
11 given the pleading requirements, the applicable standards based on his delineated causes of  
12 action, and leave to file a Third Amended Complaint. Plaintiff is advised that this is the last time  
13 he will be given leave to file an amended complaint, so he should do his very best to organize it  
14 in an understandable fashion and to comply with all of the law stated herein. Plaintiff is further  
15 advised that only the claims in his Third Amended Complaint that are found cognizable will be  
16 allowed to proceed. Any claims in Plaintiff's Third Amended Complaint that are not cognizable  
17 will be dismissed and will count as strikes under Fed.R.Civ.P. 18(a).

18       C.     Pleading Requirements

19           1. *Federal Rule of Civil Procedure 8(a)*

20       “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited  
21 exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534  
22 U.S. 506, 512 (2002); Fed. R. Civ. Pro. 8(a). Pursuant to Rule 8(a), a complaint must contain “a  
23 short and plain statement of the claim showing that the pleader is entitled to relief . . . .” Fed. R.  
24 Civ. Pro. 8(a). “Such a statement must simply give the defendant fair notice of what the  
25 plaintiff’s claim is and the grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. A court  
26 may dismiss a complaint only if it is clear that no relief could be granted under any set of facts  
27 that could be proved consistent with the allegations. Id. at 514. “The issue is not whether a  
28 plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support

1 the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and  
2 unlikely but that is not the test.”” Jackson v. Carey, 353 F.3d 750, 755 (9th Cir. 2003) (quoting  
3 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)); see also Austin v. Terhune, 367 F.3d 1167, 1171  
4 (9th Cir. 2004) (“Pleadings need suffice only to put the opposing party on notice of the claim . . .  
5 . . .”” (quoting Fontana v. Haskin, 262 F.3d 871, 977 (9th Cir. 2001))). However, “the liberal  
6 pleading standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams, 490  
7 U.S. 319, 330 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not supply  
8 essential elements of the claim that were not initially pled.” Bruns v. Nat’l Credit Union Admin.,  
9 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir.  
10 1982)).

11 Plaintiff’s Second Amended Complaint fails to comply with Rule 8(a) as it fails to  
12 provide a short and plain statement as to his claim(s) against each named defendant. As to each  
13 defendant he intends to pursue, Plaintiff must make his claims and their factual basis brief and  
14 easily understandable. It appears that in his amended complaints, Plaintiff has merely repeated  
15 variations of his factual scenarios and added additional defendants and legal verbiage. Neither  
16 the Court nor any defendants should have to parse what might be cognizable claims from this  
17 morass. It is Plaintiff’s obligation to draft a complaint that is coherent, cohesive, and concise.  
18 Plaintiff is advised that any references to legal authority and/or legal argument are not  
19 appropriate, and should not be included in any Third Amended Complaint.

20 ***2. Federal Rule of Civil Procedure 18(a)***

21 “The controlling principle appears in Fed.R.Civ.P. 18(a) ‘A party asserting a claim to  
22 relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as  
23 independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has  
24 against an opposing party.’ Thus multiple claims against a single party are fine, but Claim A  
25 against Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated  
26 claims against different defendants belong in different suits, not only to prevent the sort of  
27 morass [a multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners  
28 pay the required filing fees-for the Prison Litigation Reform Act limits to 3 the number of

1 frivolous suits or appeals that any prisoner may file without prepayment of the required fees. 28  
2 U.S.C. § 1915(g)." George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007).

3 Because the Second Amended Complaint is so unorganized, the Court is simply unable to  
4 ascertain whether all of Plaintiff's allegations are, or might be, related. Plaintiff is advised that if  
5 he chooses to file a Third Amended Complaint, and fails to comply with Rule 18(a), the Court  
6 will count all frivolous/noncognizable unrelated claims that are dismissed therein as strikes such  
7 that he may be barred from filing in forma pauperis in the future.

8 ***3. Linkage Requirement***

9 The Civil Rights Act under which this action was filed provides:

10 Every person who, under color of [state law] . . . subjects, or causes  
11 to be subjected, any citizen of the United States . . . to the  
deprivation of any rights, privileges, or immunities secured by the  
12 Constitution . . . shall be liable to the party injured in an action at  
law, suit in equity, or other proper proceeding for redress.

13 42 U.S.C. § 1983. The statute plainly requires that there be an actual connection or link between  
14 the actions of the defendants and the deprivation alleged to have been suffered by Plaintiff. See  
15 Monell v. Department of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
16 (1976). The Ninth Circuit has held that "[a] person 'subjects' another to the deprivation of a  
17 constitutional right, within the meaning of section 1983, if he does an affirmative act, participates  
18 in another's affirmative acts or omits to perform an act which he is legally required to do that  
19 causes the deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th  
20 Cir. 1978). In order to state a claim for relief under section 1983, Plaintiff must link each named  
21 defendant with some affirmative act or omission that demonstrates a violation of Plaintiff's  
22 federal rights.

23 Plaintiff mentions a number of prison personnel by surname in his factual allegations, but  
24 fails to list these persons as defendants in the caption, or anywhere else in his Second Amended  
25 Complaint. Plaintiff must appropriately identify all individuals whom he intends to pursue as  
26 defendants in this action. Further, Plaintiff should clarify which defendant(s) he feels are  
27 responsible for any violation(s) of his constitutional rights, as his complaint must put each  
28 defendant on notice of Plaintiff's claims against him or her. See Austin v. Terhune, 367 F.3d

1 1167, 1171 (9th Cir. 2004).

2 **4. *Exhibits***

3 Plaintiff is advised that the Court is not a repository for the parties' evidence. Originals,  
4 or copies of evidence (i.e., prison or medical records, witness affidavits, etc.) need not be  
5 submitted until the course of litigation brings the evidence into question (for example, on a  
6 motion for summary judgment, at trial, or when requested by the Court). At this point, the  
7 submission of evidence is premature as Plaintiff is only required to state a *prima facie* claim for  
8 relief. Thus, in amending his complaint, Plaintiff would do well to simply state the facts upon  
9 which he alleges a defendant has violated his constitutional rights and refrain from submitting  
10 exhibits.

11 If Plaintiff feels compelled to submit exhibits with his amended complaint, he is  
12 reminded that such exhibits must be attached to the complaint and must be incorporated by  
13 reference. Fed. R. Civ. Pro. 10(c). With regard to exhibits that are properly attached to the  
14 complaint, Plaintiff is cautioned that it is the Court's duty to evaluate the factual allegations  
15 within a complaint, not to wade through exhibits, to determine whether cognizable claims have  
16 been stated.

17 If Plaintiff attaches exhibits to his amended complaint, each exhibit must be specifically  
18 referenced. For example, Plaintiff must state "see Exhibit A" or something similar in order to  
19 direct the Court to the specific exhibit Plaintiff is referencing. Further, if the exhibit consists of  
20 more than one page, Plaintiff must reference the specific page of the exhibit (i.e. "See Exhibit A,  
21 page 3"). Finally, the Court reminds Plaintiff that the Court must assume that Plaintiff's factual  
22 allegations are true. Therefore, it is generally unnecessary for Plaintiff to submit exhibits in  
23 support of the allegations in a complaint.

24 **D. Claims for Relief**

25 **1. *Retaliation***

26 Allegations of retaliation against a prisoner's First Amendment rights to speech or to  
27 petition the government may support a section 1983 claim. Rizzo v. Dawson, 778 F.2d 527, 532  
28 (9th Cir. 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v.

1 Rowland, 65 F.3d 802, 807 (9th Cir. 1995). “Within the prison context, a viable claim of First  
2 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some  
3 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that  
4 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did  
5 not reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-  
6 68 (9th Cir. 2005).

7 An allegation of retaliation against a prisoner’s First Amendment right to file a prison  
8 grievance is sufficient to support a claim under section 1983. Bruce v. Ylst, 351 F.3d 1283, 1288  
9 (9th Cir. 2003).

10 Adverse action is action that “would chill a person of ordinary firmness” from engaging  
11 in that activity. Pinard v. Clatskanie School Dist., 467 F.3d 755, 770 (9th Cir. 2006); White v.  
12 Lee, 227 F.3d 1214, 1228 (9th Cir. 2000); see also Lewis v. Jacks, 486 F.3d 1025, 1028 (8th Cir.  
13 2007); see also Thomas v. Eby, 481 F.3d 434, 440 (6th Cir. 2007); Bennett v. Hendrix, 423 F.3d  
14 1247, 1250-51 (11th Cir. 2005); Constantine v. Rectors & Visitors of George Mason Univ., 411  
15 F.3d 474, 500 (4th Cir. 2005); Gill v. Pidlypchak, 389 F.3d 379, 381 (2d Cir. 2004); Rauser v.  
16 Horn, 241 F.3d 330, 333 (3d Cir. 2001). Both litigation in court and filing inmate grievances are  
17 protected activities and it is impermissible for prison officials to retaliate against inmates for  
18 engaging in these activities. However, not every allegedly adverse action will be sufficient to  
19 support a claim under section 1983 for retaliation. In the prison context, cases in this Circuit  
20 addressing First Amendment retaliation claims involve situations where the action taken by the  
21 defendant was clearly adverse to the plaintiff. Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir.  
22 2005) (arbitrary confiscation and destruction of property, initiation of a prison transfer, and  
23 assault in retaliation for filing grievances); Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir.  
24 2004) (retaliatory placement in administrative segregation for filing grievances); Bruce v. Ylst,  
25 351 F.3d 1283, 1288 (9th Cir. 2003) (retaliatory validation as a gang member for filing  
26 grievances); Hines v. Gomez, 108 F.3d 265, 267 (9th Cir. 1997) (retaliatory issuance of false  
27 rules violation and subsequent finding of guilt); Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir.  
28 1995) (retaliatory prison transfer and double-cell status in retaliation); Valandingham v.

1 Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989) (inmate labeled him a snitch and approached by  
2 other inmates and threatened with harm as a result); Rizzo v. Dawson, 778 F.2d 527, 530-32 (9th  
3 Cir. 1985) (retaliatory reassignment out of vocational class and transfer to a different prison).

4 **2. Failure to Protect/Safety**

5 “The treatment a prisoner receives in prison and the conditions under which he is  
6 confined are subject to scrutiny under the Eighth Amendment.” Farmer v. Brennan, 511 U.S.  
7 825, 832 (1994) (citing Helling v. McKinney, 509 U.S. 25, 31 (1993)). Prison officials have a  
8 duty to take reasonable steps to protect inmates from physical abuse. Farmer, 511 U.S. at 833;  
9 Hoptowit v. Ray, 682 F.2d 1237, 1250-51 (9th Cir. 1982). To establish a violation of this duty,  
10 the prisoner must establish that prison officials were “deliberately indifferent to a serious threat  
11 to the inmates’s safety.” Farmer, at 834. The question under the Eighth Amendment is whether  
12 prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently  
13 substantial ‘risk of serious damage to his future health … .’” Farmer, 511 U.S. at 843 (citing  
14 Helling v. McKinney, 509 U.S. 25, 35 (1993)). The Supreme Court has explained that  
15 “deliberate indifference entails something more than mere negligence … [but] something less  
16 than acts or omissions for the very purpose of causing harm or with the knowledge that harm will  
17 result.” Farmer, 511 U.S. at 835. The Court defined this “deliberate indifference” standard as  
18 equal to “recklessness,” in which “a person disregards a risk of harm of which he is aware.” Id. at  
19 836-37.

20 The deliberate indifference standard involves both an objective and a subjective prong.  
21 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” Id. at 834.  
22 Second, subjectively, the prison official must “know of and disregard an excessive risk to inmate  
23 health or safety.” Id. at 837; Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir. 1995).  
24 To prove knowledge of the risk, however, the prisoner may rely on circumstantial evidence; in  
25 fact, the very obviousness of the risk may be sufficient to establish knowledge. Farmer, 511 U.S.  
26 at 842; Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995).

27 The Supreme Court has stated that a remedy for unsafe conditions need not await a tragic  
28 event. Where a risk/injury has yet to occur, the plaintiff’s burden would be to prove that his

1 future health/safety is unreasonably endangered, “that it is contrary to current standards of  
2 decency for anyone to be so exposed against his will, and that prison officials are deliberately  
3 indifferent to his plight.” Helling, 509 U.S. at 33-35.

4 Further, Eighth Amendment claims have been correctly rejected where a prisoner had not  
5 been retaliated against and had not alleged any basis to infer that the defendant was aware his  
6 actions had exposed plaintiff to a substantial risk of serious harm. Morgan v. MacDonald, 41  
7 F.3d 1291, 1293-94 (9th Cir. 1994) (emphasis added) (prisoner alleged that the director stated  
8 that if prisoner’s Fair Labor Standards Act claim was successful, inmate co-workers would have  
9 to be fired, but he failed to address both the objective prong (that he had been retaliated against  
10 by other inmate co-workers, or that there was a substantial risk of serious harm to his future  
11 health/safety as a result of the statement), and the subjective prong (any basis to infer that the  
12 director was aware that his statement exposed Morgan to a substantial risk of serious harm).)

13 Thus, in order to state a cognizable claim against prison officials for failure to provide for  
14 a prisoner’s safety/protection, a prisoner must allege facts to show (and eventually prove): (1) a  
15 sufficiently serious risk of harm (either current or future); (2) that was caused by the  
16 defendant(s); and (3) that the defendant(s) knew that his/her action(s) exposed the prisoner to that  
17 serious risk of harm.

18 ***3. Deliberate Indifference to Serious Medical Needs***

19 Where a prisoner’s Eighth Amendment claim is one of inadequate medical care, the  
20 prisoner must allege and prove “acts or omissions sufficiently harmful to evidence deliberate  
21 indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976). Such a  
22 claim has two elements: “the seriousness of the prisoner’s medical need and the nature of the  
23 defendant’s response to that need.” McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir.1991). A  
24 medical need is serious “if the failure to treat the prisoner’s condition could result in further  
25 significant injury or the ‘unnecessary and wanton infliction of pain.’” McGuckin, 974 F.2d at  
26 1059 (quoting Estelle, 429 U.S. at 104). Indications of a serious medical need include “the  
27 presence of a medical condition that significantly affects an individual’s daily activities.” Id. at  
28 1059-60. By establishing the existence of a serious medical need, a prisoner satisfies the

1 objective requirement for proving an Eighth Amendment violation. Farmer v. Brennan, 511 U.S.  
2 825, 834 (1994).

3 If a prisoner establishes the existence of a serious medical need, he or she must then show  
4 that prison officials responded to the serious medical need with deliberate indifference. Farmer,  
5 511 U.S. at 834. Deliberate indifference can be manifested by prison guards intentionally  
6 denying or delaying access to medical care or intentionally interfering with the treatment once  
7 prescribed. Estelle, 429 U.S. at 104-05. “However, the officials’ conduct must constitute ‘ ‘  
8 ‘unnecessary and wanton infliction of pain’ ’ ’ before it violates the Eighth Amendment. Hallett  
9 v. Morgan 296 F.3d 732, 745 (2002) quoting Estelle, 429 U.S. at 104 (quoting Gregg v. Georgia,  
10 428 U.S. 153, 173 (1976)); see also Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir.1998).

11 In general, deliberate indifference may be shown when prison officials deny, delay, or  
12 intentionally interfere with medical treatment, or it may be shown by the way in which prison  
13 officials provide medical care. Hutchinson v. United States, 838 F.2d 390, 393-94 (9th  
14 Cir.1988). Before it can be said that a prisoner’s civil rights have been abridged with regard to  
15 medical care, however, “the indifference to his medical needs must be substantial. Mere  
16 ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”  
17 Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir.1980) (*citing Estelle*, 429 U.S. at  
18 105-06). See also Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir.2004). Deliberate  
19 indifference is “a state of mind more blameworthy than negligence” and “requires ‘more than  
20 ordinary lack of due care for the prisoner’s interests or safety.’ ” Farmer, 511 U.S. at 835  
21 (*quoting Whitley*, 475 U.S. at 319). “Deliberate indifference is a high legal standard.” Toguchi,  
22 391 F.3d at 1060. “Under this standard, the prison official must not only ‘be aware of the facts  
23 from which the inference could be drawn that a substantial risk of serious harm exists,’ but that  
24 person ‘must also draw the inference.’ ” Id. at 1057 (*quoting Farmer*, 511 U.S. at 837). “‘If a  
25 prison official should have been aware of the risk, but was not, then the official has not violated  
26 the Eighth Amendment, no matter how severe the risk.’ ” Id. (*quoting Gibson v. County of*  
27 Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)).

28 Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S.

1 at 104-05. Deliberate indifference can be manifested by prison guards intentionally denying or  
2 delaying access to medical care or intentionally interfering with the treatment once prescribed.  
3 Estelle, 429 U.S. at 104-05. To establish a claim of deliberate indifference arising from delay, a  
4 plaintiff must show that the delay was harmful. See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th  
5 Cir.1994) (*per curiam*); McGuckin, 974 F.2d at 1059; Wood v. Housewright, 900 F.2d 1332,  
6 1335 (9th Cir.1990); Hunt v. Dental Dep’t, 865 F.2d 198, 200 (9th Cir.1989); Shapley v. Nevada  
7 Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir.1985) (*per curiam*). Mere differences  
8 of opinion between a prisoner and prison medical staff as to proper medical care do not give rise  
9 to a § 1983 claim. See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.1996); Sanchez v. Vild,  
10 891 F.2d 240, 242 (9th Cir.1989); Franklin v. Oregon, 662 F.2d 1337, 1334 (9th Cir.1981).

11 Further, “[a] necessary component of minimally adequate medical care is maintenance of  
12 complete and accurate medical records … The harm that flows to [inmate] class members from  
13 inadequate or absent medical records is manifest.” Coleman v. Wilson, 912 F.Supp. 1282, 1314  
14 (E.D.Cal.1995). Medical records that are “inadequate, inaccurate and unprofessionally  
15 maintained” create “a grave risk of unnecessary pain and suffering” in violation of the Eighth  
16 Amendment. Cody v. Hillard, 599 F.Supp. 1025, 1057 (D.S.D.1984). “Inadequate  
17 record-keeping restricts treatment and follow-up care.” Tillery v. Owens, 719 F.Supp. 1256,  
18 1302 (W.D.Pa.1989). “Adequate and accurate medical records are critically important in any  
19 attempt to provide continuity of medical care.” Burks v. Teasdale, 492 F.Supp. 650, 676  
20 (W.D.Mo.1980).

21 **4. *Inmate Appeals***

22 The Due Process Clause protects prisoners from being deprived of liberty without due  
23 process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to state a cause of  
24 action for deprivation of due process, a plaintiff must first establish the existence of a liberty  
25 interest for which the protection is sought. “States may under certain circumstances create liberty  
26 interests which are protected by the Due Process Clause.” Sandin v. Conner, 515 U.S. 472, 483-  
27 84 (1995). Liberty interests created by state law are generally limited to freedom from restraint  
28 which “imposes atypical and significant hardship on the inmate in relation to the ordinary

1 incidents of prison life.” Sandin, 515 U.S. at 484.

2 “[A prison] grievance procedure is a procedural right only, it does not confer any  
3 substantive right upon the inmates.” Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993)  
4 (citing Azeez v. DeRobertis, 568 F. Supp. 8, 10 (N.D. Ill. 1982)); see also Ramirez v. Galaza,  
5 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of appeals because no  
6 entitlement to a specific grievance procedure); Massey v. Helman, 259 F.3d 641, 647 (7th Cir.  
7 2001) (existence of grievance procedure confers no liberty interest on prisoner); Mann v. Adams,  
8 855 F.2d 639, 640 (9th Cir. 1988). “Hence, it does not give rise to a protected liberty interest  
9 requiring the procedural protections envisioned by the Fourteenth Amendment.” Azeez v.  
10 DeRobertis, 568 F. Supp. at 10; Spencer v. Moore, 638 F. Supp. 315, 316 (E.D. Mo. 1986).

11 Actions in reviewing prisoner’s administrative appeal cannot serve as the basis for  
12 liability under a § 1983 action. Buckley, 997 F.2d at 495. The argument that anyone who knows  
13 about a violation of the Constitution, and fails to cure it, has violated the Constitution himself is  
14 not correct. “Only persons who cause or participate in the violations are responsible. Ruling  
15 against a prisoner on an administrative complaint does not cause or contribute to the violation. A  
16 guard who stands and watches while another guard beats a prisoner violates the Constitution; a  
17 guard who rejects an administrative complaint about a completed act of misconduct does not.”  
18 George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) citing Greeno v. Daley, 414 F.3d 645,  
19 656-57 (7th Cir. 2005); Reed v. McBride, 178 F.3d 849, 851-52 (7th Cir. 1999); Vance v. Peters,  
20 97 F.3d 987, 992-93 (7th Cir. 1996).

21 “Once a prison grievance examiner becomes aware of potential mistreatment, the Eight  
22 Amendment does not require him or her to do more than ‘review [the prisoner’s] complaints and  
23 verif[y] with the medical officials that [the prisoner] was receiving treatment.” Greeno v. Daley,  
24 414 F.3d 645, 656 (7th Cir. 2005) citing Spruill v. Gillis, 372 F.3d, 218, 236 (3rd Cir. 2004)  
25 (finding that non-medical defendants could not be considered deliberately indifferent simply  
26 because they failed to respond directly to the medical complaints of a prisoner who was already  
27 being treated by the prison doctor) and Hernandez v. Keane 341 F.3d 137, 148 (3rd Cir. 2003)  
28 (finding no deliberate indifference by a non-medical defendant who received an inmate grievance

related to medical issues and delegated responsibility for investigating the grievance(s) to other prison staff). The prison grievance examiner in Greeno, to whom this standard applied, was a *non-medical* prison personnel. The quoted verbiage and standard specifically applied to *non-medical* prison personnel who reviewed inmates' medical prison grievances. However, medical personnel can be found liable for their action in reviewing an inmate's medical appeal under the Eighth Amendment if their review and/or handling of the inmate's medical appeal amount to deliberate indifference to the inmate's serious medical needs.

### **5. Procedural Due Process**

The Due Process Clause protects prisoners from being deprived of liberty without due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to state a cause of action for deprivation of due process, a plaintiff must first establish the existence of a liberty interest for which the protection is sought. "States may under certain circumstances create liberty interests which are protected by the Due Process Clause." Sandin v. Conner, 515 U.S. 472, 483-84 (1995). Liberty interests created by state law are generally limited to freedom from restraint which "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484.

"Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S. 539, 556 (1974). With respect to prison disciplinary proceedings, the minimum procedural requirements that must be met are: (1) written notice of the charges; (2) at least 24 hours between the time the prisoner receives written notice and the time of the hearing, so that the prisoner may prepare his defense; (3) a written statement by the fact finders of the evidence they rely on and reasons for taking disciplinary action; (4) the right of the prisoner to call witnesses and present documentary evidence in his defense, when permitting him to do so would not be unduly hazardous to institutional safety or correctional goals; and (5) legal assistance to the prisoner where the prisoner is illiterate or the issues presented are legally complex. Id. at 563-71. Confrontation and cross examination are not generally required. Id. At 567. As long as the five minimum Wolff requirements are met, due process has been satisfied. Walker v. Sumner, 14

1 F.3d 1415, 1420 (9th Cir. 1994).

2 “When prison officials limit a prisoner’s right to defend himself they must have a  
3 legitimate penological interest.” Koenig v. Vannelli, 971 F.2d 422, 423 (9th Cir. 1992) (per  
4 curiam) (concluding that prisoners do not have a right to have an independent drug test  
5 performed at their own expense). The right to call witnesses may legitimately be limited by “the  
6 penological need to provide swift discipline in individual cases . . . [or] by the very real dangers  
7 in prison life which may result from violence or intimidation directed at either other inmates or  
8 staff.” Ponte v. Real, 471 U.S. 491, 495 (1985); see also Mitchell v. Dupnik, 75 F.3d 517, 525  
9 (9th Cir. 1996); Koenig, 971 F.2d at 423; Zimmerlee v. Keeney, 831 F.2d 183, 187-88 (9th Cir.  
10 1987)(per curiam).

11 “[T]he requirements of due process are satisfied if some evidence supports the decision  
12 by the prison disciplinary board . . . .” Hill, 472 U.S. at 455; see also Toussaint v. McCarthy,  
13 926 F.2d 800, 802-03 (9th Cir. 1991); Bostic v. Carlson, 884 F.2d 1267, 1269-70 (9th Cir. 1989);  
14 Jancsek, III v. Oregon bd. Of Parole, 833 F.2d 1389, 1390 (9<sup>th</sup> Cir. 1987); Cato v. Rushen, 824  
15 F.2d 703, 705 (9th Cir. 1987); see especially Burnsworth v. Gunderson, 179 F.3d 771, 774-74  
16 (9th Cir. 1999) (where there is no evidence of guilt may be unnecessary to demonstrate existence  
17 of liberty interest.) “Some evidence” must support the decision of the hearing officer.  
18 Superintendent v. Hill, 472 U.S. 445, 455 (1985). The standard is not particularly stringent and  
19 the relevant inquiry is whether “there is *any* evidence in the record that could support the  
20 conclusion reached . . . .” Id. at 455-56 (emphasis added).

21 **6. Substantive Due Process**

22 The Due Process Clause protects prisoners from being deprived of property without due  
23 process of law, Wolff v. McDonnell, 418 U.S. 539, 556 (1974), and prisoners have a protected  
24 interest in their personal property, Hansen v. May, 502 F.2d 728, 730 (9th Cir. 1974). However,  
25 while an authorized, intentional deprivation of property is actionable under the Due Process  
26 Clause, see Hudson v. Palmer, 468 U.S. 517, 532, n.13 (1984) (citing Logan v. Zimmerman  
27 Brush Co., 455 U.S. 422 (1982)); Quick v. Jones, 754 F.2d 1521, 1524 (9th Cir. 1985), neither  
28 negligent nor unauthorized intentional deprivations of property by a state employee “constitute a

1 violation of the procedural requirements of the Due Process Clause of the Fourteenth  
2 Amendment if a meaningful postdeprivation remedy for the loss is available,” Hudson v.  
3 Palmer, 468 U.S. 517, 533 (1984).

4 An authorized, intentional deprivation of property is actionable under the Due Process  
5 Clause. See Hudson v. Palmer, 468 U.S. 517, 532, n.13 (1984) (citing Logan v. Zimmerman  
6 Brush Co., 455 U.S. 422 (1982)); Quick v. Jones, 754 F.2d 1521, 1524 (9th Cir. 1985). An  
7 authorized deprivation is one carried out pursuant to established state procedures, regulations, or  
8 statutes. Logan v. Zimmerman Brush Co., 455 U.S. at 436; Piatt v. McDougall, 773 F.2d 1032,  
9 1036 (9th Cir. 1985); see also Knudson v. City of Ellensburg, 832 F.2d 1142, 1149 (9th Cir.  
10 1987). Authorized deprivations of property are permissible if carried out pursuant to a regulation  
11 that is reasonably related to a legitimate penological interest. Turner v. Safley, 482 U.S. 78, 89  
12 (1987).

13 “An unauthorized intentional deprivation of property by a state employee does not  
14 constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth  
15 Amendment if a meaningful postdeprivation remedy for the loss is available.” Hudson v.  
16 Palmer, 468 U.S. 517, 533 (1984). Thus, where the state provides a meaningful postdeprivation  
17 remedy, only authorized, intentional deprivations constitute actionable violations of the Due  
18 Process Clause. An authorized deprivation is one carried out pursuant to established state  
19 procedures, regulations, or statutes. Piatt v. McDougall, 773 F.2d 1032, 1036 (9th Cir. 1985);  
20 see also Knudson v. City of Ellensburg, 832 F.2d 1142, 1149 (9th Cir. 1987).

21 ***7. Supervisory Liability***

22 Supervisory personnel are generally not liable under section 1983 for the actions of their  
23 employees under a theory of respondeat superior and, therefore, when a named defendant holds a  
24 supervisorial position, the causal link between him and the claimed constitutional violation must  
25 be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v.  
26 Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). To state a claim  
27 for relief under section 1983 based on a theory of supervisory liability, plaintiff must allege some  
28 facts that would support a claim that supervisory defendants either: personally participated in the

1 alleged deprivation of constitutional rights; knew of the violations and failed to act to prevent  
2 them; or promulgated or “implemented a policy so deficient that the policy ‘itself is a repudiation  
3 of constitutional rights’ and is ‘the moving force of the constitutional violation.’” Hansen v.  
4 Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations omitted); Taylor v. List, 880 F.2d  
5 1040, 1045 (9th Cir. 1989). Although federal pleading standards are broad, some facts must be  
6 alleged to support claims under section 1983. See Leatherman v. Tarrant County Narcotics Unit,  
7 507 U.S. 163, 168 (1993).

### 8. *State Law Claims*

9 California’s Tort Claims Act requires that a tort claim against a public entity or its  
10 employees be presented to the California Victim Compensation and Government Claims Board,  
11 formerly known as the State Board of Control, no more than six months after the cause of action  
12 accrues. Cal. Gov’t Code §§ 905.2, 910, 911.2, 945.4, 950-950.2 (West 2006). Presentation of a  
13 written claim, and action on or rejection of the claim are conditions precedent to suit. State v.  
14 Superior Court of Kings County (Bodde), 32 Cal.4th 1234, 1245, 90 P.3d 116, 124, 13  
15 Cal.Rptr.3d 534, 543 (2004); Mangold v. California Pub. Utils. Comm’n, 67 F.3d 1470, 1477  
16 (9th Cir. 1995). To state a tort claim against a public employee, a plaintiff must allege  
17 compliance with the Tort Claims Act. State v. Superior Court, 32 Cal.4th at 1245, 90 P.3d at  
18 124, 13 Cal.Rptr.3d at 543; Mangold, 67 F.3d at 1477; Karim-Panahi v. Los Angeles Police  
19 Dept., 839 F.2d 621, 627 (9th Cir. 1988).

#### 20 a. *Negligence*

21 A public employee is liable for injury to a prisoner “proximately caused by his negligent  
22 or wrongful act or omission.” Cal. Gov’t Code § 844.6(d) (West 2006). “In order to establish  
23 negligence under California law, a plaintiff must establish four required elements: (1) duty; (2)  
24 breach; (3) causation; and (4) damages.” Ileto v. Glock Inc., 349 F.3d 1191, 1203 (9th Cir.  
25 2003). “To establish negligence, a party must prove the following: (a) a *legal duty* to use due  
26 care; (b) a breach of such legal duty; (c) the breach as the *proximate* or *legal cause* of the  
27 resulting injury.” Hair v. State, 2 Cal. Rptr. 2nd 871, 875 (Cal. Ct. App. 1991) (citations  
28 omitted).

**b. *Medical Malpractice***

To establish medical negligence (malpractice), a plaintiff must state (and subsequently prove) all of the following: (1) that the defendant was negligent; (2) that the plaintiff was harmed; and (3) that the defendant's negligence was a substantial factor in causing the plaintiff's harm. Ladd v. County of San Mateo (1996) 12 Cal.4th 913, 917; Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 673; Restatement Second of Torts, section 328A; and Judicial Council Of California Civil Jury Instruction 400, Summer 2008 Supplement Instruction. Medical professionals are negligent if they fail to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful medical professional would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care." Landeros v. Flood 17 Cal.3d 399, 408 (1976); see also Brown v. Colm 11 Cal.3d 639, 642–643 (1974); Mann v. Cracchiolo (1985) 38 Cal.3d 18, 36; and Judicial Council Of California Civil Jury Instruction 500, Summer 2008 Supplement Instruction.

**c. *Intentional Infliction of Emotional Distress***

Under California law, the elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Simo v. Union of Needletrades, Industrial & Textile Employees, 322 F.3d 602, 621-22 (9th Cir. 2003) (citing to Christensen v. Superior Court, 54 Cal.3d 868, 903 (1991)) (quotations omitted). In addition to the requirement that the conduct be intentional and outrageous, the conduct must have been directed at Plaintiff or occur in the presence of Plaintiff, of whom Defendant was aware. Simo, 322 F.3d at 622 (citing Christensen, 54 Cal.3d at 903) (quotations omitted).

## II. CONCLUSION

For the reasons set forth above, Plaintiff's Second Amended Complaint is dismissed, with leave to file a Third Amended Complaint within thirty days. If Plaintiff needs an extension of time to comply with this order, Plaintiff shall file a motion seeking an extension of time no later

1 than thirty days from the date of service of this order.

2 Plaintiff must demonstrate in his complaint how the conditions complained of have  
3 resulted in a deprivation of Plaintiff's constitutional rights. See Ellis v. Cassidy, 625 F.2d 227  
4 (9th Cir. 1980). A Third Amended Complaint must allege in specific terms how each named  
5 defendant is involved. There can be no liability under section 1983 unless there is some  
6 affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo  
7 v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v.  
8 Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

9 Plaintiff's Third Amended Complaint should be brief, Fed. R. Civ. P. 8(a), but must state  
10 what each named defendant did that led to the deprivation of Plaintiff's constitutional or other  
11 federal rights. Hydrick v. Hunter, 500 F.3d 978, 987-88 (9th Cir. 2007). Although accepted as  
12 true, the “[f]actual allegations must be [sufficient] to raise a right to relief above the speculative  
13 level . . . .” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007) (citations omitted).

14 Plaintiff is further advised that an amended complaint supercedes the original complaint,  
15 Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567  
16 (9th Cir. 1987), and must be “complete in itself without reference to the prior or superceded  
17 pleading,” Local Rule 15-220. Plaintiff is warned that “[a]ll causes of action alleged in an  
18 original complaint which are not alleged in an amended complaint are waived.” King, 814 F.2d  
19 at 567 (citing to London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord  
20 Forsyth, 114 F.3d at 1474.

21 The Court provides Plaintiff with this final opportunity to amend to cure the deficiencies  
22 identified by the Court in this order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).  
23 Plaintiff may not change the nature of this suit by adding new, unrelated claims in his amended  
24 complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

25 Based on the foregoing, it is HEREBY ORDERED that:

- 26 1. Plaintiff's Second Amended Complaint is dismissed, with leave to amend;
- 27 2. The Clerk's Office shall send Plaintiff a civil rights complaint form;
- 28 3. Within **thirty (30) days** from the date of service of this order, Plaintiff must file a

Third Amended Complaint curing the deficiencies identified by the Court in this order; and

4. If Plaintiff fails to comply with this order, this action will be dismissed for failure to state a claim.

IT IS SO ORDERED.

Dated: March 16, 2009

/s/ William M. Wunderlich  
UNITED STATES MAGISTRATE JUDGE